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SUMMARY RECORD OF THE 702nd MEETING

Held at Headquarters, New York,
on Thursday, 29 June 2000, at 10 a.m.

Chairman: Mr. Jeffrey CHAN (Singapore)

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(continued)

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00-51130 (E)

The meeting was called to order at 10.05 a.m.

DRAFT LEGISLATIVE GUIDE ON PRIVATELY FINANCED INFRASTRUCTURE PROJECTS (continued) (A/CN.9/471/Add.1-9)

1. Mr. WALLACE (United States of America) suggested that the last three recommendations should be as brief as possible, and that recommendation 68 bis should be deleted. It seemed to be a rather arbitrary choice of subject. Although the issue was important, it was discussed thoroughly in the notes.

2. Mr. MORÁN BOVIO (Spain) said that recommendation 68 bis should remain in the text, because the purpose of the Guide was to advise both legislators and investors. It was important that the legislation should indicate to what extent the contracting authority could plead immunity. The contracting authorities and States needed to be aware of the twofold effect of preserving immunity, which maintained the State's authority but could be a deterrent to investors. That idea, which was clearly explained in the notes, should be expressed in a recommendation.

3. Ms. GAVRILESCU (Romania) supported the United States proposal to delete recommendation 68 bis, which did not seem to be based on the Commission's policy, as expressed in the notes. The notes referred to the options available to States for settling any disputes in their relations with the concessionaire. There was emphasis on the voluntary nature of those options. There was also a reference to the conditions in which such solutions might be applied. Nothing was compulsory: the verbs were all in the conditional tense - the States "may" or "could" do something.

4. The recommendation was asking States to renounce their sovereign immunity. Perhaps the Commission should consider whether it was competent to discuss that sensitive issue. Recommendation 68 already offered States a free choice of settlement mechanisms, and recommendation 68 bis was thus unnecessary.

5. Ms. MANGKLATANAKUL (Thailand) agreed that the recommendation should be deleted. Sovereign immunity was an executive prerogative and could not be dealt with by a legislative body. Also, the concept of sovereign immunity in relation to commercial contracts had not yet been accepted in international law. Work was continuing in the International Law Commission, and the Sixth Committee had set up a working group to look into the issue. Any reference in the Guide should be consistent with the work of those bodies, and she therefore preferred the option of deleting the recommendation.

6. In addition, although paragraphs 33 to 35 of the notes contained in document A/CN.9/471/Add.7, concerning sovereign immunity, were acceptable, she felt that paragraph 36 should be deleted.

7. Ms. FOLLIOT (France) supported the proposal to delete recommendation 68 bis. She also proposed moving paragraph 36 of the notes to the beginning of the section on sovereign immunity, with a slight amendment at the end, to read "in which areas the contracting authorities may or may not plead sovereign immunity."

8. The CHAIRMAN said he took it that paragraph 68 bis would be deleted.

9. It was so decided.

10. Mr. WIWEN-NILSSON (Observer for Sweden) found the deletion of paragraph 36 of the notes acceptable, assuming that the last two lines of paragraph 33 would also be deleted. The question of whether there would be a waiver of immunity at the executive level was a decision relating to an individual project.

11. Ms. NIKANJAM (Islamic Republic of Iran) said that the Commission needed to establish the limits between the parties to the project agreements, and not leave sovereign immunity to domestic law.

12. Mr. MORÁN BOVIO (Spain) said that paragraph 36 of the notes did not add to or detract from existing sovereign immunities, but merely requested every State to declare as clearly as possible where the boundary of sovereign immunities lay. His delegation preferred to retain the paragraph in its present form, in order to draw the attention of legislators to the issue.

13. Mr. WALLACE (United States of America) supported the French proposal concerning moving paragraph 36 to the beginning of the section.

14. In response to the views expressed by the Thai and Iranian delegations, he said that the wording of paragraph 36 did not have any implications with regard to a legislative or executive prerogative. Some Governments, according to the notes, would not be free to deal with that matter unless the issue was clarified by law. He did not think that retaining paragraph 36 would in any way prejudge consideration of the issue by the International Law Commission.

15. The CHAIRMAN pointed out that paragraph 36 did not contain the word "should" or "must". It did not even use the word "may" alone, but the expression "may wish". The language could hardly be more benign.

16. Mr. RENGER (Germany) shared the views expressed by the French and United States delegations.

17. Mr. MARADIAGA (Honduras) pointed out that the Commission was discussing notes that were intended to instruct and enlighten legislators. Sovereign immunity was a fundamental prerogative; consequently, the more explanatory the notes were, the better. For the reasons outlined by the representative of Spain, he believed the paragraph should be retained.

18. Ms. MANGKLATANAKUL (Thailand) said that paragraph 36 did not seem to add anything to the notes or have any particular effect. However, if the Commission wished to retain the paragraph, her delegation would not object.

19. Mr. WIWEN-NILSSON (Observer for Sweden) said he understood that if paragraph 36 was retained and moved ahead of paragraph 33, the last sentence of current paragraph 33 would be deleted.

20. Ms. FOLLIOT (France) said she did not believe that the last sentence of paragraph 33 would be redundant.

21. Mr. MORÁN BOVIO (Spain), supported by Mr. KASHIWAGI (Japan), agreed that the last sentence of paragraph 33 should be retained. The text was intended to help the authorities clarify the important issue of the boundaries of sovereign immunity, for the benefit of the other contracting parties. The French proposal seemed to enjoy the support of the majority of the Commission.

22. The CHAIRMAN noted that the last sentence of paragraph 33 would be retained, and paragraph 36, as orally amended by the French delegation, would be moved to the very beginning of the section on sovereign immunity.

23. It was so decided.

Draft recommendation 69

24. Mr. PANG (Singapore) noted that recommendation 69 in document A/CN.9/471/Add.9 should begin with the words "The concessionaire and the project promoters", to make it consistent with document A/CN.9/471/Add.7.

25. Mr. ESTRELLA FARIA (International Trade Law Branch) confirmed that understanding.

26. The CHAIRMAN assumed that the Committee wished to adopt the draft recommendation.

27. Draft recommendation 69, as orally amended, was adopted.

Draft recommendation 70

28. The CHAIRMAN, in the absence of any objection, assumed that the Commission accepted the text of draft recommendation 70.

29. Draft recommendation 70 was adopted.

30. Mr. KASHIWAGI (Japan) said that, according to paragraphs 30 and 43 of document A/CN.9/471/Add.7, arbitration was the preferred method for settling disputes; however, he had the impression that lenders usually preferred litigation, especially in large international financing transactions.

31. Mr. WIWEN-NILSSON (Observer for Sweden) said that while it was true that lenders did not usually want to have arbitration clauses in loan agreements, they normally did request such clauses in project agreements.

32. Mr. HERRMANN (Secretary of the Commission) pointed out that banks often resorted to arbitration in order not to be exposed to a jury trial and other features of litigation. In the case of project agreements, arbitration was the preferred method.

33. Mr. SARIE ELDIN (Egypt) said that he agreed with that point, particularly in relation to projects involving local and international financing. The statement that "arbitration is preferred by private investors and lenders" therefore reflected current trends and practice.

34. Mr. WALLACE (United States of America) said that there should be a clarification in paragraph 43, since it was concerned with loan agreements.

35. The CHAIRMAN said that that issue could be left to the Secretariat.

36. Mr. WIWEN-NILLSON (Observer for Sweden) said that paragraph 2 (a) of document A/CN.9/471/Add.7 should be amended, because it was not true that in "most" civil law countries, the project agreement was governed by administrative law. In paragraph 27, the words "or arbitrate" and "or arbitration" should be added after the words "litigate" and "litigation".

37. Mr. ESTRELLA FARIA (International Trade Law Branch) said that while it was true that not all civil law countries had the same system of separation of administrative jurisdiction, project agreements were invariably governed by administrative law.

38. Mr. MORÁN BOVIO (Spain) said that he supported the existing wording of paragraph 2 (a).

39. The CHAIRMAN said that the Commission still needed to resolve the issue of whether chapter VII should be combined with chapter I.

40. Mr. WALLACE (United States of America) said that he was in favour of moving chapter VII into chapter I, because it would simplify and streamline the final product.

41. Mr. REICHEL (Observer for the World Bank) said that a reading of chapter I, part B (3), in document A/CN.9/471/Add.2, showed that the contents of chapter VII fitted perfectly under the heading "General and sector-specific legislation". Chapter VII could be streamlined and shortened. However, competition law should be added to the list in that chapter.

42. Mr. MORÁN BOVIO (Spain) said that the issue was one of aesthetics. If chapter VII was incorporated into chapter I, that chapter would be too long, and the balance of the text as a whole would be lost.

43. Mr. WIWEN-NILSSON (Observer for Sweden) said that he agreed that the issue was cosmetic; the Commission should not rewrite the text.

44. Mr. MOHAMED (Nigeria) suggested that some parts of chapter VII could be moved to chapter I, and the rest left in chapter VII, in order to maintain the balance of the text as a whole.

45. The CHAIRMAN said that there would then be a debate on which parts of chapter VII should be moved.

46. Mr. RENGER (Germany) said that in 1999 the Commission had already held an extensive debate on chapter VII. It should not reopen that debate.

47. Mr. DEWAST (European Lawyers Union) said that he supported the proposal that competition law should be included in chapter VII, because it was a very important subject for investors.

48. Mr. ESTRELLA FARIA (International Trade Law Branch) recalled that chapter VII had originally been part of chapter I, but had been repeatedly expanded through the addition of further areas of law and had eventually become a separate section and moved to the end of the Guide. There had once been a separate chapter on competition law, but the Commission had decided that part of the chapter would be retained and incorporated into chapter I, and the rest would be deleted.

49. The CHAIRMAN stressed that the Commission should not reopen issues which had already been settled.

50. Mr. WALLACE (United States of America) said that if a streamlined version of chapter VII was incorporated in chapter I, that chapter would not be disproportionately long.

51. Mr. LALLIOT (France) said that his delegation was reluctant to take up either the substance of chapter VII, or competition law. His delegation had no firm view about whether chapter VII should be moved into chapter I, but noted that, since the chapters were of variable length, there would not be any significant imbalance in the structure of the Guide.

52. Mr. SARIE ELDIN (Egypt) proposed that chapter VII should become chapter II, so as to have a logical sequence from "General legislative and institutional framework" to "Other relevant areas of law". It would be unwise to embark on a discussion of chapter VII, or of the question of competition law.

53. Mr. WIWEN-NILSSON (Observer for Sweden) pointed out that there were already references to competition law in other parts of the Guide.

54. The CHAIRMAN said that there did not seem to be strong support for including competition law in chapter VII.

The meeting was suspended at 11.35 p.m. and resumed at 12.05 p.m.

55. The CHAIRMAN invited the Commission to comment on the proposal by the representative of Egypt that chapter VII should be relocated to follow chapter I.

56. Mr. WALLACE (United States of America), supported by Mr. REICHEL (Observer for the World Bank), supported the proposal.

57. Mr. MOHAMED (Nigeria) offered qualified support.

58. Mr. DARCY (United Kingdom) concurred: his delegation would not wish to countenance a prolonged debate on editorial and cosmetic issues. The adoption of the Guide was what really counted.

59. Mr. RENGER (Germany) said he preferred the order of chapters to remain unchanged. Chapter VII, dealing as it did with marginal points, had been placed at the end precisely so that it should not distract the reader from the main thrust of the Guide.

60. Mr. KASHIWAGI (Japan), Ms. GAVRILESCU (Romania) and Ms. MANGKLATANAKUL (Thailand) endorsed that view.

61. Ms. Li Ling (China) said that, if chapter VII were relocated, it would be necessary to decide on a new title, which could involve lengthy discussions. The order of chapters should be left unchanged.

62. Mr. MARADIAGA (Honduras) said that the current placement was satisfactory, whereas relocating chapter VII might prove more complicated than expected, without leading to any substantial improvement.

63. Ms. SANDERSON (Observer for Canada) said that cosmetic changes could inadvertently turn into substantive changes. Chapter VII should therefore remain in its present position.

64. Mr. WIWEN-NILSSON (Observer for Sweden) said that, having listened to all the arguments, he too supported the view expressed by the representative of Germany.

65. The CHAIRMAN took it that the Commission was in favour of leaving the order of chapters unchanged.

66. It was so decided.

67. The CHAIRMAN invited the Commission to consider the desirability of including a consolidation of the legislative recommendations in the final presentation of the Guide.

68. Mr. HERRMANN (Secretary of the Commission) said that the Secretariat was open to a request by the Commission that the legislative recommendations should appear in a consolidated form. He recommended, however, that rather than being issued separately, as in document A/CN.9/471/Add.9, they should appear in the same volume as the notes, which should be read in conjunction with them. A similar approach had been followed in earlier instances of legal documents. A subsidiary question was whether the recommendations should be repeated later in the volume together with the relevant notes. He would not advise that plan of action; the reader would find it easy to consult the recommendations, since they would be in the same volume.

69. Mr. MORÁN BOVIO (Spain) endorsed the Secretary's suggestion. There was no need to repeat the recommendations before the notes if they appeared in consolidated form at the start of the volume.

70. Ms. NIKANJAM (Islamic Republic of Iran) and Ms. GAVRILESCU (Romania) expressed support for the Secretary's suggestion.

71. Mr. WIWEN-NILSSON (Observer for Sweden) said that, if the suggestion was adopted, the first line of the foreword, contained in document A/CN.9/471/Add.9, would need to be changed.

72. The CHAIRMAN took it that, subject to the editorial change proposed by the observer for Sweden, the Commission wished to adopt the Secretary's suggestion.

73. It was so decided.

74. Mr. HAMILTON (Economic Commission for Europe) expressed his conviction that the Guide would prove a most valuable product. In Europe, in the 1990s, it had been assumed that a legal and regulatory framework was not as important as the existence of strong contracts between the public and private sectors. Experience had shown the exact opposite to be the case. The Guide would thus send a clear signal to Governments that legal and regulatory issues were vitally important for promoting public and private partnerships. The Economic Commission for Europe had promoted such partnerships over the past five years, with a particular emphasis on the transition economies of central and eastern Europe and the Commonwealth of Independent States. Considerable experience of the challenges in implementing such partnerships had thus been accumulated.

75. The need for a regulatory framework, a concession law, proper regulation for specific sectors, an efficient dispute resolution system and, in some instances, a constitutional framework had been clearly understood. Some Governments had little or no experience of working with the private sector, and project development costs could be considerable. His Commission had therefore adopted a pragmatic approach, preparing tools to help Governments, including advisory guidelines that complemented the Guide.

76. Many Governments, however, were moving to the next stage, that of project implementation. They were therefore given help in developing projects that could lead to an improvement of their legal framework. They were also being helped to develop an appropriate structure for promoting public and private partnerships. In the Czech Republic, for example, model projects in the transport and other fields were to be established.

77. His Commission also aimed to increase the confidence of Governments in negotiating with foreign investors. According to the World Bank, in some countries in Asia contracts were often biased towards the investor's side, with the result that projects were either stopped or renegotiated, with a corresponding waste of time and resources. A negotiating platform had therefore been prepared in order to help Governments determine what their public interests were and how to protect them.

78. The "build-operate-transfer" (BOT) group, which carried out promotion work for his Commission, consisted of a network of over 100 experts from the public and private sectors, with practical business experience. A major strength of the group was its neutrality: it was not the preserve of any one sector. It sought to maintain a balance between East and West and between public and private. The group had received considerable help from the Commission's own experts.

79. Lastly, he suggested that the best way of disseminating the Guide would be to organize joint seminars with his Commission to help explain the Guide in a practical way. Experts from his Commission would also be ready to assist in developing a concession law for the European region, using the Guide as a basis,

or else in developing standard documents on public and private partnership. Any such cooperation would save costs and would be to the mutual advantage of the two Commissions.

80. The CHAIRMAN called on all States to disseminate the Legislative Guide and accompanying notes and thanked the Economic Commission for Europe (ECE) for offering to assist in that task.

81. He then invited the Commission to consider whether it wished to undertake any further work in the area of privately financed infrastructure projects.

82. Mr. MORÁN BOVIO (Spain) asked the Secretariat to comment on the matter.

83. Mr. HERRMANN (Secretary of the Commission) said that when the Commission had begun its work on the Guide, the widely held view had been that it was not feasible to seek consensus on a model law or other statutory provisions. At present, however, he thought that it would be relatively easy to develop statutory provisions on the issue of procurement.

84. To be sure, the Commission's traditional task was to harmonize legal instruments and prepare uniform laws for international use. States with highly developed legal systems might have little interest, however, in amending their legislation to conform to a model law; it might be more feasible to provide model statutory provisions for adoption by States in need of them.

85. Before work on the Guide had begun, the legislation of some 80 countries had been examined and had revealed a wide variety of approaches to the topic; some national legal systems provided only an abstract framework while others included extremely detailed provisions. He therefore suggested that participants in the current session should be asked to comment on their specific needs rather than on the general desirability of such a project so that the Commission could assess not only the costs involved, but also how the differences in national legal systems could be accommodated in a model law.

86. One expert had suggested that as in the case of the Model Law on Procurement of Goods, Construction and Services, the Commission might develop a series of "road maps" that would include options appropriate to various legal systems.

87. Ms. NIKANJAM (Islamic Republic of Iran) said that States which had economies in transition and were endeavouring to attract foreign capital and modernize their infrastructure attached great importance to ensuring the establishment of fair, transparent domestic legislation and standards and to the harmonization of national legal systems in the field of trade. Since the Commission had completed its work on the Guide, she hoped that it would consider establishing a working group with a view to developing a model law or other statutory provisions that could be incorporated into domestic law as a basis for the implementation of project agreements.

88. Mr. LALLIOT (France) said he had hoped that the Secretary would reply in more practical terms; his delegation had sought information on alternatives to a model law; the procedure to be followed if one was to be developed, including

the establishment of a working group or expert group; the costs involved; and a reasonable timetable for completion of the project in light of the Commission's existing agenda.

89. Mr. DARCY (United Kingdom) said that his delegation was somewhat sceptical about the proposed project's feasibility. The Commission had devoted four years to the Guide and might require as much or more time to develop a model law; States might not be prepared to wait so long, and it would be unwise to waste scarce resources if there was limited support for such an instrument. He therefore suggested that the Secretariat should write to the Governments of all States members of the Commission in order to assess their interest in the proposal.

90. Mr. WALLACE (United States of America) said that his delegation had always been interested in the possibility of developing a model law. While it was true that a model law would not be of equal value to all Governments, it had been suggested that it might be used, inter alia, to harmonize legislation at the domestic level in a federal system like that of his own country.

91. He agreed that the Secretariat should be asked to contact Governments to assess their interest in such a project; however, he thought that the lessons learned during the Commission's work on the Guide would allow it to complete work on the model law within two years by establishing working groups. The Commission had addressed issues such as the form and content of draft model laws in the past with more success than it had been given credit for; his delegation had a number of suggestions to make in that regard. Above all, the Commission should remember that many countries desperately required investment in all sectors, especially that of infrastructure.

92. The CHAIRMAN suggested that the Commission should begin by asking participants whether their Governments were interested in the development of a model law.

The meeting rose at 1 p.m.